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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

EDWARD L. FERIS and ALLEN L. FERIS, co-partners, doing business as FERIS BROS. TRUCKING CO., Appellants,

v.

LEO A. BALCOM and DOROTHY LORRAINE BALCOM, co-partners, doing business as D & L LOGGING COMPANY or D & L Logging Co.; and C. C. CAFFALL, R. H. CAFFALL and REX CAFFALL, JR., co-partners, doing business as CAFFALL BROTHERS FOREST PRODUCTS or CAFFALL BROTHERS; and CAFFALL BROS. FOREST PRODUCTS, INC., a corporation

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

Robert W. Gilley
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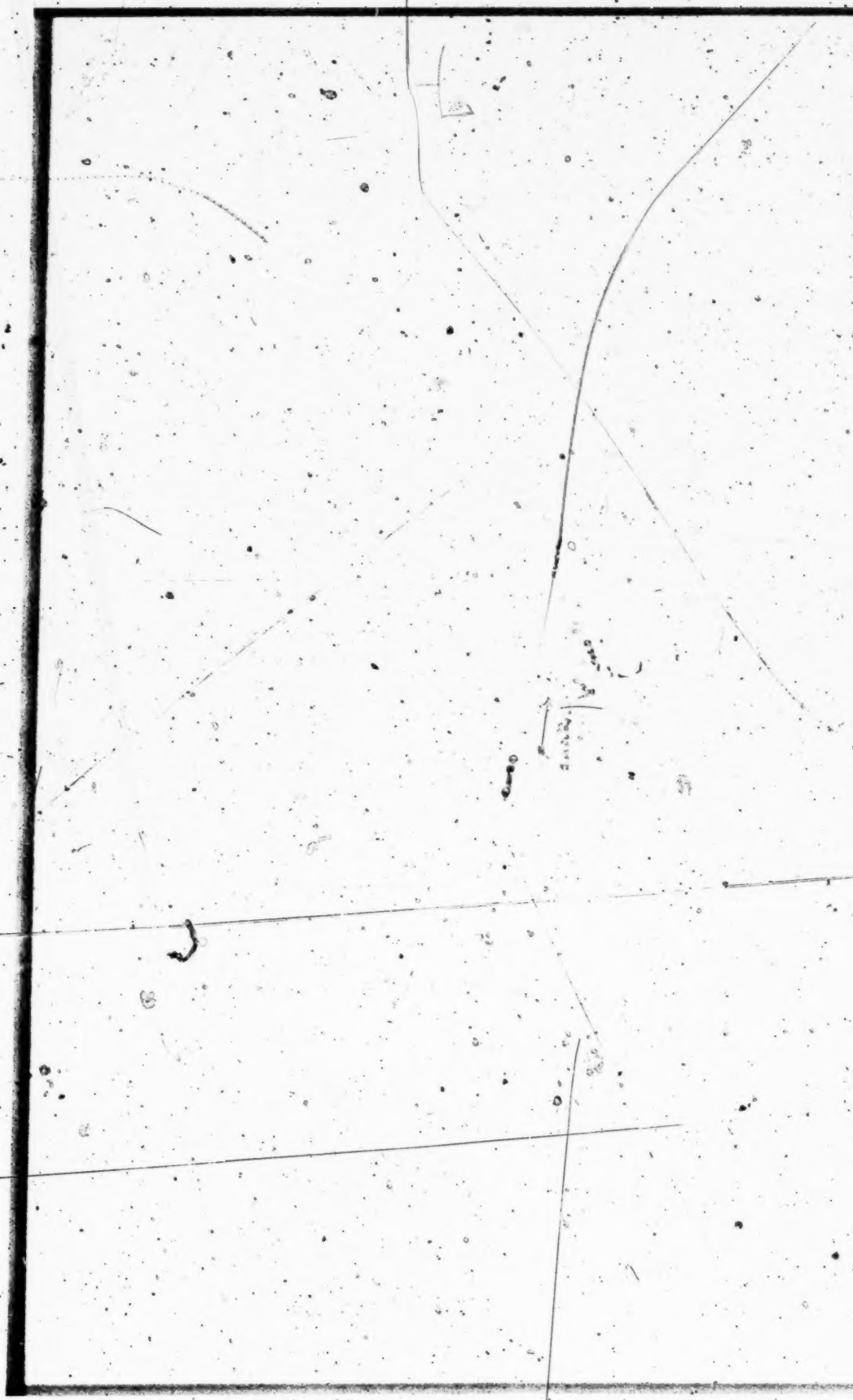

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Circuit Court for Clackamas County, Oregon, rendered no formal opinion, but did deliver an opinion from the bench which is reported in the transcript, Volume I, pages

61 to 70, interspersed among statements of counsel. It is set forth in Appendix, Exhibit A, infra, page 1a. The opinion of the Supreme Court of Oregon is reported at 85 Or. Adv. 453, 432 P.2d 684. It is set forth in Appendix, Exhibit B, infra, page 2a.

JURISDICTION

This suit was brought by appellants in equity under the authority of Section 87.645, Oregon Revised Statutes, to foreclose a logger's lien on logs hauled by appellants to ponds and other places designated by appellees, in which appellants pleaded such a lien, and prayed for a judgment and a decree foreclosing the lien.

Appellees pleaded affirmatively and have contended throughout that appellants' lien was void on these grounds: First, appellants' lien notice asserted a lien for labor of their employees as well as their own labor as individuals. Second, appellants

are not entitled to a lien for the labor of their employees, by virtue of a decision of the Supreme Court of Oregon construing the logger's lien statute, Section 87.125, Oregon Revised Statutes: McKinley v. Tice, 129 Or. 190, 276 P. 1110 (1929). Third, there was therefore a commingling of lienable and non-lienable items which rendered the notice of lien defective and the lien itself void.

Appellants concede that appellees' first contention is correct. We also concede that appellees' third contention cannot be refuted if it is finally determined herein that appellants do not have a lien for the labor of their employees. On the other hand, this third contention cannot be sustained if appellants are held to have such a lien.

The sole controversy before this Court, therefore, is concerned with appellees' second contention, which appellants deny. Appellants do concede, however, that the

Court declared in the McKinley case and in the present case that a hauler of logs cannot have a logger's lien for the labor of his employees.

Appellants pleaded affirmatively, and have contended throughout that the limitation that a hauler of logs to ponds and similar places, is not entitled to a logger's lien for the labor of his employees, so declared by the Supreme Court of Oregon, is invalid as it denies to appellants the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and violates the Constitution of Oregon, for the reason that a hauler of logs to an improvement or construction site, under like circumstances, is entitled to a mechanic's lien for his own labor and that of his employees, under Section 87.010, Oregon Revised Statutes.

The Circuit Court for Clackamas County upheld the constitutionality of the limita-

tion that an employer may not have a logger's lien for the labor of his employees, sustained all three of appellees' contentions, and entered an order dismissing this suit. The Supreme Court of Oregon decided this constitutional question in favor of the validity of the limitation herein mentioned, and dated and actually entered its final decree on November 15, 1967, Appendix, Exhibit C, infra, page 3a, affirming the decision of the Circuit Court.

The notice of appeal was filed by appellants with the Clerk of the Supreme Court of Oregon on January 29, 1968.

Jurisdiction to review a decree of the highest court of a state by appeal is conferred on this Court by 28 U.S. Code, § 1257 (2) and § 2101 (c). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 66 L.Ed.239(1922),

42 S.Ct. 106; Standard Oil Co. v. Johnson, 316 U.S. 481, 86 L.Ed. 1611 (1942), 62 S.Ct. 1168; United States v. Allegheny County, 322 U.S.174, 191, 88 L.Ed. 1209 (1944), 64 S.Ct. 908; Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 98 L.Ed. 546 (1954), 74 S.Ct. 403.

STATUTES INVOLVED

The logger's and woodworker's statute, one limitation of which is contended by appellants to be unconstitutional, is found in Sections 87.125, 87.130, 87.135, 87.140, 87.645 and 87.670, Oregon Revised Statutes, Volume 1, pages 679, 680, 695, and 696.

These are set forth verbatim in Appendix, Exhibit D, infra, page 4a. For convenience, the section creating and defining the logger's lien is quoted at this point, as it was until September, 1967:

"87.125 Logger's lien. Every person performing labor upon or who shall assist in obtaining or securing sawlogs, spars, piles, cordwood or other timbers, has a lien upon the same for the work or labor done upon or

in obtaining or securing the same, whether such work or labor was done at the instance of the owner or his agent. The cook in a logging or other camp, and any and all others who may assist in or about a logging or other camp maintained for obtaining or securing sawlogs, spars, piles, cordwood or other timber, shall be regarded for the purpose of this section, as a person who assists in obtaining or securing sawlogs, spars, piles, cordwood or other timber."

The remainder of this statute, Sections 87.625, 87.640, 87.650 to 87.665, and 87.675, Oregon Revised Statutes, is also set forth verbatim in the Appendix, Exhibit D, infra, page 4c.

The mechanic's and materialman's lien statute is in Sections 87.005 to 87.075, Oregon Revised Statutes, Volume 1, pages 672 to 676. The section creating and defining this lien provides:

"87.010 Liens of mechanics and materialmen; who is entitled to lien. (1) Any mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman or other person performing labor upon, transporting or furnishing any material to be used in the construction of any improvement shall have a lien upon the improvement for the labor, transportation or material furnished at the instance of the owner of the improvement or his agent.

(2) Any person who shall, at the re-

quest of the owner of a lot, grade, fill in or otherwise improve the lot or the street adjoining the lot, shall have a lien upon the lot for such work done and materials furnished."

The mechanic's lien statute was originally enacted in 1895 and the logger's and woodworker's lien statute in 1891. Both were repealed and reenacted simultaneously in 1953, however, upon the adoption of the Oregon Revised Statutes as an independent enactment and not merely as a compilation of prior law: State of Oregon v. Holland, 202 Or. 656, 277 P.2d 386 (1954); State of Oregon v. Davis, 207 Or. 525, 296 P.2d 240 (1956).

QUESTION PRESENTED

Whether Section 87.125, Oregon Revised Statutes, construed by the Supreme Court of Oregon in the present case, to mean that an employer may not have a logger's lien thereunder for the labor of his employees, denies to appellants the equal protection of the laws guaranteed by the Fourteenth Amendment, inasmuch as an employer may have a mechanic's

lien for the labor of his employees under like circumstances.

STATEMENT

The Parties

For convenience, when it becomes necessary to distinguish between appellees, they will be designated by name, as follows: The two Balcoms doing business as D & L Logging Company, or Co., will be referred to as "the Balcoms;" and all the other appellees will be referred to as "Caffall Brothers."

The Proceedings, Including the Manner of Raising the Constitutional Question

This suit was brought in equity by appellants to recover the amount due them for hauling logs pursuant to a contract with the Balcoms. This was a subcontract as the Balcoms had previously made a contract with Caffall Brothers, the owners of the logs, to cut and haul the logs for the latter.

The case proceeded to trial on the amended complaint, the fourth amended answer, and the reply.

The amended complaint is in the form of one to foreclose a logger's lien and for a judgment and sale of the logs as on execution.

Appellees pleaded affirmatively in their fourth amended answer that appellants are not entitled to a lien for the labor of their employees, and therefore appellants' lien notice contains lienable and non-lienable items which cannot be segregated by anything appearing on the face of the notice of lien, and that appellants' lien is therefore void.

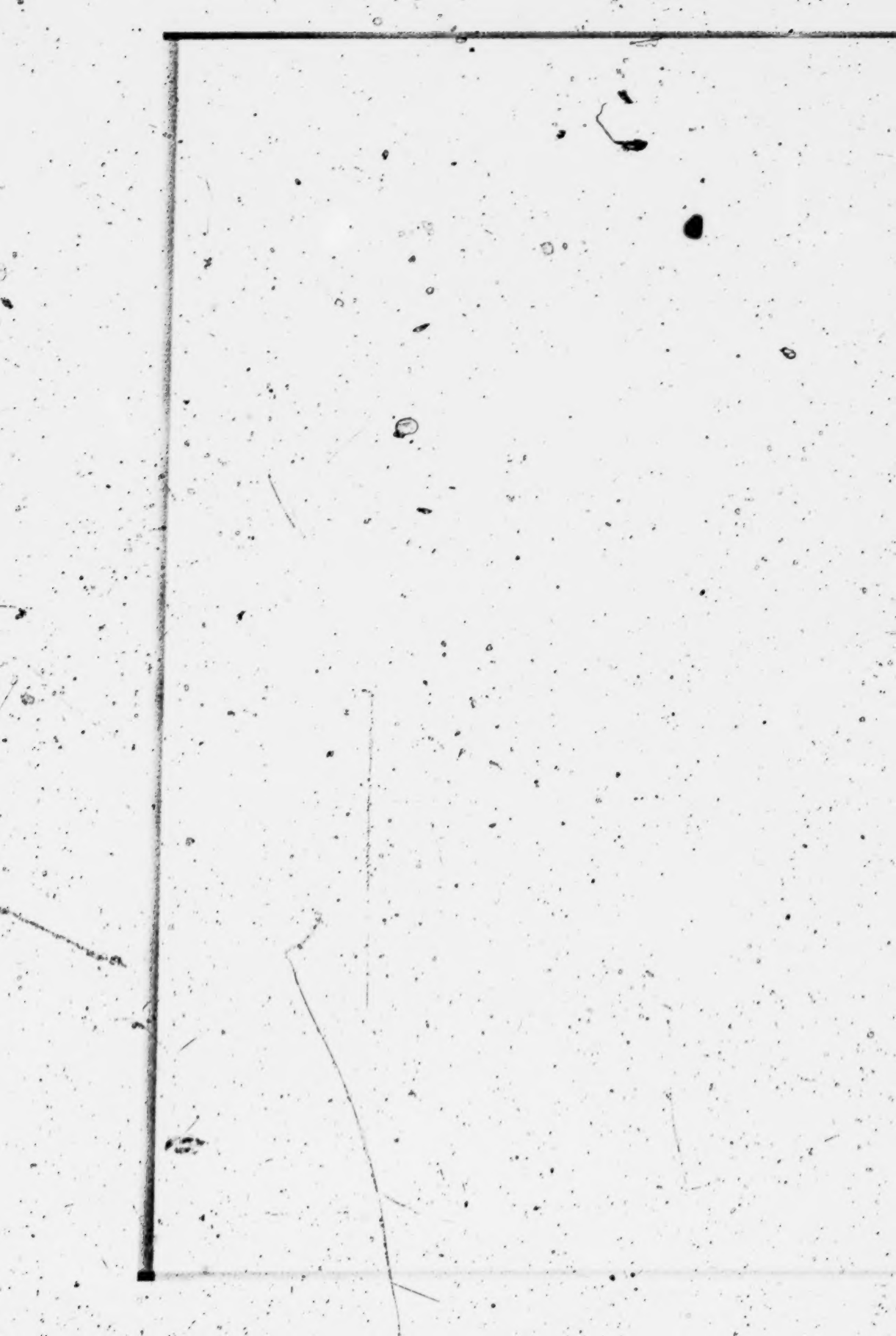
Appellants first raised this constitutional question by pleading their contention concerning it in their first affirmative reply to the affirmative answer of appellees which is mentioned in the preceding paragraph of this Statement, in these words:

"Paragraph II alleges: 'That ORS 87.125, by which the Plaintiffs' said lien was created, is unconstitutional and void insofar as it has been construed to mean that no employer is entitled to a lien under said statute for the labor of his employees, for the reason that said statute as so construed, denies to the Plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States,

and the protection of Article I, Section 20, of the Constitution of Oregon, for the reason that a hauler of building materials, including logs for use in the construction of an improvement, under like circumstances, is entitled to a mechanic's lien under ORS 87.010 for the labor of his employees, and ORS 87.125, therefore, to the extent mentioned, unreasonably and arbitrarily and without any fair and substantial reason relating to the general and legislative purpose to be accomplished, wrongfully, arbitrarily and unreasonably places the business of these Plaintiffs into an arbitrary and unreasonable class, and arbitrarily attempts to distinguish between the business of hauling building materials, including logs, to be used in the construction of an improvement, and the business of hauling logs to a log dump to be sold or to be cut into lumber and sold; that there is no peculiarity in the condition of those engaged in the latter business which justifies their segregation for the purpose of prohibiting them from having a lien for the labor of their employees.' "

During the trial, before appellants had concluded their proofs, appellees moved to dismiss the suit on the grounds stated in their affirmative answer. This motion is reported in the transcript of proceedings before the Circuit Court, Volume I, pages 21 to 24, and 56.

Counsel for appellants opposed the motion to dismiss and in doing so, stated their contention that the limitation in the logger's lien statute that an employer can not have a lien for the labor



of his employees, is unconstitutional and void in that it amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment, and of the protection of the Constitution of Oregon.

This motion was considered by the Court twice during the trial.

On the first occasion counsel for appellants made these statements:

"THE COURT: Well, Mr. Hill, how do we get around the Oregon decision of McKinley vs. Tice, for example?

MR. HILL: I know that case well, your Honor, and as we have plead in one of our affirmative replies, we are contending that the logger's lien Statute insofar as it has been limited by that case to labor performed by the plaintiffs themselves and thereby excluding the labor of employees, to that extent the loggers lien Statute is unconstitutional and void.

It denies to the plaintiffs the equal protection of the law under the Fourteenth Amendment of the Constitution of the United States, and it denies to them the equality which is guaranteed by the Oregon Constitution, * * *"

* * * * *

"Now there is no substantial difference between an employer under the Mechanic's Lien Law and an employer under the Logger's Lien Law.

In McKinley against Tice the Court says point blank, we cannot permit an employer under the Logger's Lien Law to have a lien for his employees, but we do under the Mechanic's Lien Law.

They say right there, well, there is a difference between the two."

* * * * *

"* * *and so we don't have to look to the interpretation to see what it ought to be, other than to analyze this thing and see whether there is any real difference between an employer under the Mechanics Lien Law who has the employees hauling logs under that law and an employer under the Logger's Lien Law who hauls logs.

He may have the same type of equipment, his economic problems are exactly the same, his situation is the same.

There is no real difference between a hauler of logs under one law and under the other law and the cases which I will cite to the Court will establish that when the legislature confers a benefit on somebody such as employers under the Logger's Lien Law and they confer a benefit on somebody under the Mechanic's Lien Law, but they impose a limitation on employers under the Logger's Lien Law and say, well, you can't have a lien for the labor of your employees, that is a discrimination which is unconstitutional and void, because there is no real difference between the situation of a hauler in one situation and another hauler in another."

Transcript of Proceedings Before
the Circuit Court, Volume I,
pages 24 to 27.

On the second occasion counsel for appellants

made similar statements. See Appendix, Exhibit A, infra, page 1a.

The Circuit Court ruled in favor of the validity of the limitation in the statute that an employer may not have a logger's lien for the labor of his employees. Counsel for appellants asked leave to complete their proof. This was denied. Counsel for appellants then requested the Court to enter judgment against appellees for work and labor performed as in an action at law, on the ground that appellants had established their right to a judgment by stipulation and undisputed evidence.

The Circuit Court granted appellees' motion to dismiss and denied appellants the judgment requested. Subsequently an order was entered by that Court dismissing the suit and reserving to appellants their right to proceed at law against appellees.

Finally, this constitutional question was presented to the Supreme Court of Oregon in appellants' brief, pages 23 and 30 to 35, under these assignments of error:

I. The Court erred in ruling that the plaintiffs (appellants) do not have a valid logger's lien for the labor of their employees.

II. The Court erred in ruling that the plaintiffs' (appellants') lien notice is invalid on the ground that it contains lienable and non-lienable items.

III. The Court erred in dismissing this suit. And under this proposition, supported by points of law, authorities and argument:

PROPOSITION NO. 3

"If the McKinley case is applied to this case to deny the plaintiffs a logger's lien for the labor of their employees, this will deny to the plaintiffs the Equal Protection of the laws, guaranteed by the Fourteenth Amendment of the U. S. Constitution, and will deny the equality guaranteed by Art. 1, § 20, of the Constitution of Oregon."

These are the points of law stated under Proposition No. 3:

POINTS

1.

"The Equal Protection clause of the Fourteenth Amendment of the U. S. Constitution, and Art. 1, § 20, of the Constitution of Oregon, are alike in that they constitute similar limitations upon legis-

lative action, for the protection of the individual from arbitrary or capricious legislation. Both provisions constitute a pledge of the protection of equal laws.

2.

These constitutional provisions do not require that a statute shall affect all persons exactly alike, but they do guarantee like treatment to all persons similarly situated.

3.

No classification can be countenanced unless it is based on a real and substantial difference which is relevant to the purpose which the statute seeks to achieve.

4.

These constitutional provisions guarantee that no one may be subjected by statute to any greater burdens than are imposed on others in the same calling, or condition, or in like circumstances, and no burden can be imposed on one class of persons, natural or artificial, which is not in like conditions, imposed on all other classes. A statute infringes this guaranty if it singles out for discriminatory legislation particular individuals not forming an appropriate class, and imposes upon them burdens or obligations, or subjects them to rules from which others are exempt.

5.

The principle of equality includes within its application a granted privilege as well as a regulated right. Equality of benefit is no less required than equality of burden.

6.

In other words, a statute may not impose burdens on employers of individuals which are not imposed on individuals, nor grant privileges to individuals which are not granted to employers of individuals, where both groups are engaged in the same business, under similar conditions, and with similar needs, unless such classification is reasonable and is based upon a fair, real and substantial difference between the two groups, which is relevant to thepurpose which the statute seeks to accomplish.

7.

Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand.

8.

A single clause in a comprehensive statute may be declared unconstitutional on the ground that it violates these guaranties, leaving the remainder of the act valid and effective in all respects.

9.

A contractor or subcontractor is entitled to a mechanic's lien for the labor of his employees."

The Supreme Court of Oregon sustained appellees' contention that the lien of appellants is void on the grounds stated in appellees' motion to dismiss. The Supreme Court also denied appellants a judgment against Caffall Brothers for work and labor per-

formed, the Balcoms having in the meantime gone through Bankruptcy.

The Decision of the Supreme Court of Oregon is a Final Determination of All Causes of Action at Law in Favor of Appellants and against Caffall Brothers Based Solely Upon the Hauling Pleaded in this Case.

This is worthy of mention inasmuch as the Circuit Court dismissed this suit "with leave for plaintiffs (appellants) to proceed on the law side of the court." The Circuit Court had previously ruled that it had no jurisdiction in this equity case to enter a judgment for appellants for work and labor performed as in an action at law, but the Supreme Court of Oregon considered appellants' claim for a judgment on the merits and ruled, in effect, that appellants had no cause of action at law against Caffall Brothers based solely upon the hauling pleaded in this case.

The assertions in the preceeding subheading and in the preceeding paragraph in this Statement are not intended to include or apply to a

possible claim by appellants against Caffall Brothers which might be made once the lien of appellants is declared to be valid, that Caffall Brothers have injured, impaired, destroyed or rendered difficult or impossible of identification the logs hauled by appellants on which appellants have or had a logger's lien, within the meaning of Section 87.675, Oregon Revised Statutes.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important constitutional question, never considered by this Court, involving the power of the State of Oregon to discriminate between persons engaged in the same occupation, hauling logs or piles, using the same or similar equipment, and with the same problems and needs, that is, under like circumstances.

The Supreme Court of Oregon in this case sustained the validity of the limitation that a hauler of logs to a mill pond does not have a logger's lien for the labor of his employees in

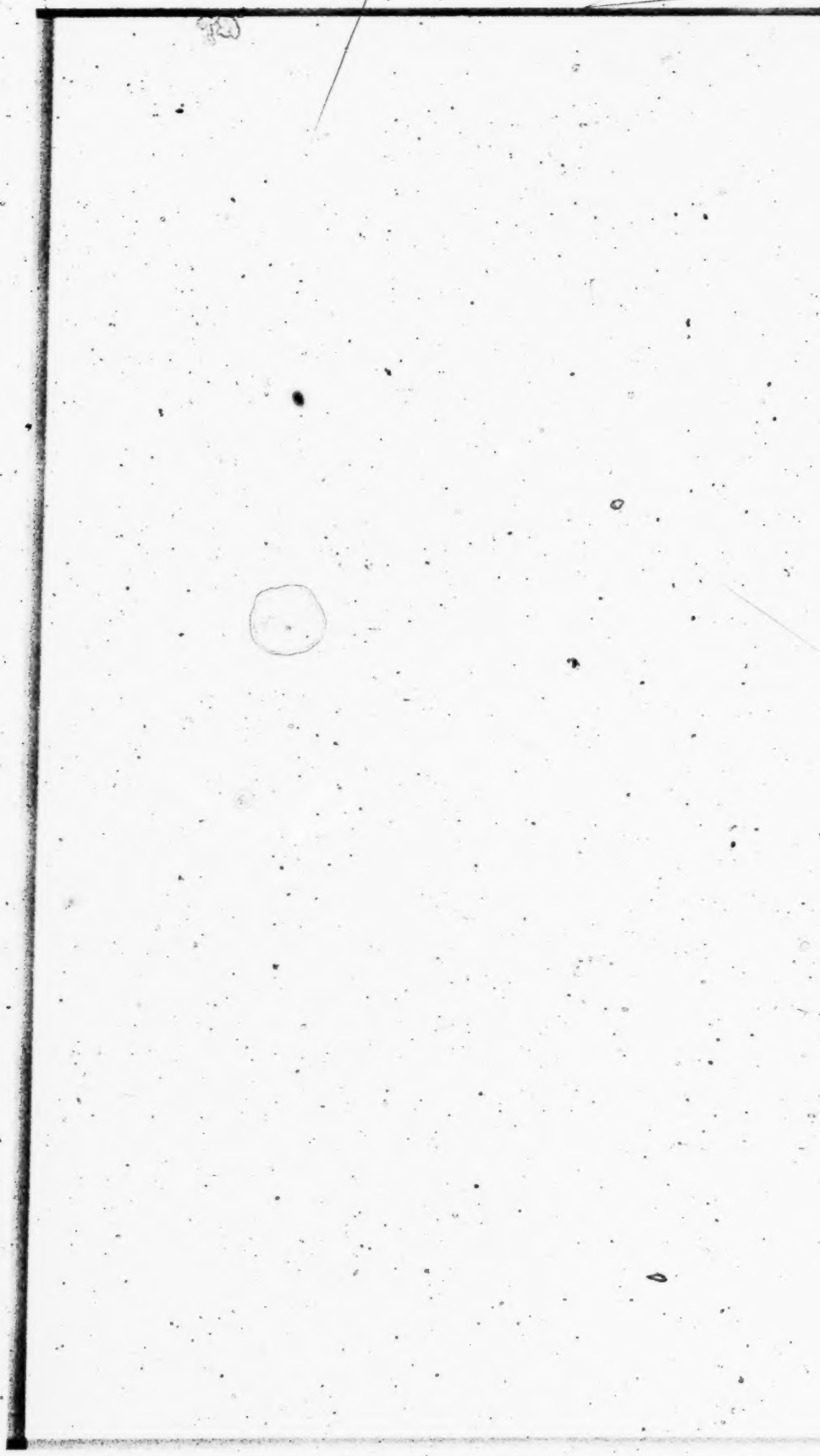
spite of its previous ruling, in effect, that one who hauls logs or piles to an improvement does have a mechanic's lien for the labor of his employees.

The entire opinion of the Supreme Court of Oregon on this question, following a statement of appellants' contention, is found in these words:

> "Clearly, there are sufficient differences between the logging industry and the construction industry to provide a reasonable basis for providing different procedures for protection of workmen's pay. There is no merit in plaintiffs' (appellants') contention."

Those entitled to loggers' liens are primarily engaged in the cutting, handling and hauling of logs, and much or most of this work is done in the woods. Those entitled to mechanics' liens include people performing labor on improvements, primarily buildings and structures of various kinds, and people who furnish materials for use in the construction of such improvements, including haulers of materials.

There is certainly a difference between these



two general classes, but, we respectfully contend, not such a difference as will justify the pronounced disparity in treatment which we are considering here.

In the first place, we contend that it is entirely immaterial that these two haulers we are considering, one to a mill pond and one to an improvement, belong to different, general classes of workers.

The only real question here is whether the Oregon legislature has discriminated against these appellants by denying to them the right to a logger's lien for the labor of their employees, whereas others engaged in the same business, under the same circumstances, are granted a mechanic's lien for such labor.

The language of the Fourteenth Amendment itself indicates that this contention is sound: No state shall deny to "any person" within its jurisdiction the equal protection of the laws.

The true meaning of this clause was stated by this Court in Hill v. Texas, 316 U.S. 400,

86 L.Ed. 1559, 62 S.Ct. 1159 (1942), to be that it is a command which the state must respect, the benefits of which every person may demand.

In the second place, no statutory discrimination can stand unless it is based upon a real and substantial difference which is relevant to the purpose which the statute seeks to achieve: Hartford Co. v. Harrison, 301 U.S. 459, 81 L.Ed. 1223, 57 S.Ct. 838 (1937); Morey v. Doud, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957).

We respectfully contend that no such relevance has been shown or found to exist in this case.

The True Situation Here

The contract between appellants and the Balcoms contemplated that the hauling to be done by appellants would be far more than they could do themselves, as individuals.

In fact, the contract included provisions for the sale of eight trucks and trailers by the Balcoms to appellants to enable the latter to do the hauling specified by the contract, with four

trucks and trailers already owned by the appellants. See Exhibit A attached to the amended complaint. Actually, appellants themselves, as individuals, did only 11% of the hauling for which this lien is claimed, and the remaining 89% was done by their employees.

Years ago, the Supreme Court of Oregon held that a hauler of cordwood was entitled to a logger's lien for his own labor and for his team as well, on the ground that the statute did not contemplate that "logs or cordwood shall be secured or handled altogether by hand."

Weissenfels v. Schaffer, 99 Or. 228, 195 P. 362 (1921).

The court has adopted the same rule in mechanic's lien cases, and in Mathis v. Thunderbird Village, Inc., 236 Or. 425, 389 P.2d 343 (1964), held that a claimant was entitled to a lien for the cost of renting certain heavy equipment, including a ditch digger, where the parties had agreed that such cost would be paid by the owner.

Certainly there is a necessary implication of fact, at least, in the present case that appellants would be paid by the Balcoms under their contract for all hauling done by appellants' employees, as appellants could not do it all themselves.

We respectfully contend that the Weissenfels and Mathis cases constitute a recognition by the Supreme Court of Oregon that there is actually a great deal of similarity between those who claim and are awarded loggers' liens and those who secure mechanics' liens, and that their problems are alike or very similar.

In fact, the Court has adopted other rules which are the same under these two statutory provisions, which point to the same conclusion, such as the following: A subcontractor has a lien for work done by him; Spratt v. Brown-Petzel Lumber Co., 105 Or. 672, 210 P. 700 (1922) (Logger's); Christman v. Salway, 103 Or. 666, 205 P. 541 (1922) (Mechanic's).

The Importance of This Question

Certain additional facts in this case and collateral rules of Oregon law must be considered at this point.

Appellants agreed to and did pay their own employees periodically, before the money for appellants' hauling was due to them from the Balcoms under their contract. Thus when the Balcoms failed to pay appellants in accordance with their contract, appellants had already paid their employees. As a result, the employees could not file lien notices as this would have required them to state under oath that they had not been paid.

Furthermore, appellants could not have protected themselves readily upon paying their employees, or at all, against the eventuality that the Balcoms would not pay appellants for this hauling when such payment should become due.

The reason for this is that under Oregon law a purported assignment by an employee of his wage claim to his employer upon receiving his

wages, will transfer the employee's chose in action only and not the employee's lien, or right to perfect a lien. The assignment is effective to transfer the lien itself only when it is delivered to the employer after the employee's lien is perfected by filing the sworn lien notice: Alderson v. Lee, 52 Or. 92, 96 P. 234 (1908).

Thus an employer can not protect himself from possible future default by the other contract party, such as the Balcoms here, except by anticipating such default and proceeding as follows: Refuse to pay his employees when their wages become due. Require each employee to sign and swear to a notice of lien asserting the wages due him. File each notice of lien with the County Clerk. Thereafter, pay each employee the amount due him and at the same time take an assignment of lien from him.

Here the defaults of the Balcoms consisted in their failure to pay for only three weeks and two days of consecutive hauling, with one minor exception.

Certainly at the beginning of such defaults, appellants could not have protected themselves as they had already paid their men. Later, if they had anticipated further defaults, they could have protected themselves by the cumbersome method above outlined if they had known of all this, and had felt it to be necessary.

The Commingling in Appellants' Lien Notice

This commingling was the voluntary act of appellants, or of their counsel rather, but exactly the same questions would have been raised, and would now be presented, if appellants' own labor, as individuals, had been segregated in the lien notice from that of their employees.

The Public Interest In This Question

We think it plain that this case presents a question of substantial importance to the people of the State of Oregon, as its logging and woodworking industry, with its collateral enterprises, is the largest in the state. In fact, a number of other states have similar re-

sources, are faced with similar problems, and have adopted remedies much the same as those in Oregon.

If the Supreme Court of Oregon is correct, one of these remedies is greatly curtailed, at least in Oregon, in the very sphere, in fact, in which all industry seems to be expanding. It is becoming less and less true that one man or two can keep up with the demands of industry.

The correctness of such a view of the Fourteenth Amendment can be settled only by a decision of this court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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Attorneys for Appellants

February, 1968

APPENDIX

EXHIBIT A

OPINION OF THE
CIRCUIT COURT FOR CLACKAMAS COUNTY OREGON
DELIVERED FROM THE BENCH
Reported Unoficially in the Transcript
of Proceedings Before the Court
Volume I, pages 61 to 70

THE COURT: Well, as I view the decisions of our Supreme Court with respect to matters of this kind, first off if it should appear to the Court that the Statute in question was in effect unconstitutional, then it is unconstitutional, it is void. It is of no effect or provides no benefit for anybody, so if I hold it to be unconstitutional, I have got to say that the plaintiffs are unable as a matter of law to de-

rive any benefit from it here.

MR. HILL: May I be heard on that very point, your Honor?

THE COURT: Yes.

MR. HILL: I don't think, frankly don't think this is the time or the place. I think we should conclude the proof before this is considered, but I feel that I have not made my point clear.

I don't contend the whole Statute is unconstitutional. I have no such contention as that. My sole----

THE COURT: No, I understand your position, Mr. Hill. I'm not trying to put words in your mouth when I make this statement, but I understand your position to be that it is an unconstitutional limitation of the benefits to be derived from the Statute to say that it may accrue only to the benefit of the actual workmen and not to the benefit of the workmen's employer.

MR. HILL: That's right. It's the only limitation, only that narrow limitation on the Statute is the only thing that is unconstitutional.

The rest of it is not, but if that is, then there's nothing wrong with this lien at all.

THE COURT: Well, the problem is simply this. While the Court does have a right and a duty in the proper situation to determine that a Statute is unconstitutional, if, in fact, it makes an improper distinction between persons entitled to the benefit of it, the Court does not have the right, as I understand the law in the face of the legislative enactment, to extend the benefit of legislation to people who were not contemplated by the Statute as being permitted the benefits of the legislation.

In other words, this Court or any Court has no right to legislate. We

simply interpret and the Legislature has said, and I make no effort to try to justify the legislation, but simply to say that the Legislature has said as our Supreme Court at least has interpreted this Statute, that only those persons who actually performed the labor in a logging enterprise are entitled to the lien that is referred to, and that this is not a lien which may be taken advantage of by an employer for work done by his employee.

Now, this Court in my opinion has no right to say, well, the Legislature has limited unreasonably the benefits of the act.

The fact of the matter is that the Legislature could have denied anyone by simply not passing this particular act, denied anybody, anyone the right of a lien for work done in a logging enterprise, and certainly no Court in the

land would have had the right to say you should have permitted liens for this work.

MR. HILL: But I don't feel, if the Court please, that I'm making my point clear. Now, 87.125 says that any person may have a lien, "Any person". Now, these two gentlemen are persons.

The mere fact that they happen to be partners does not change that. They are still persons.

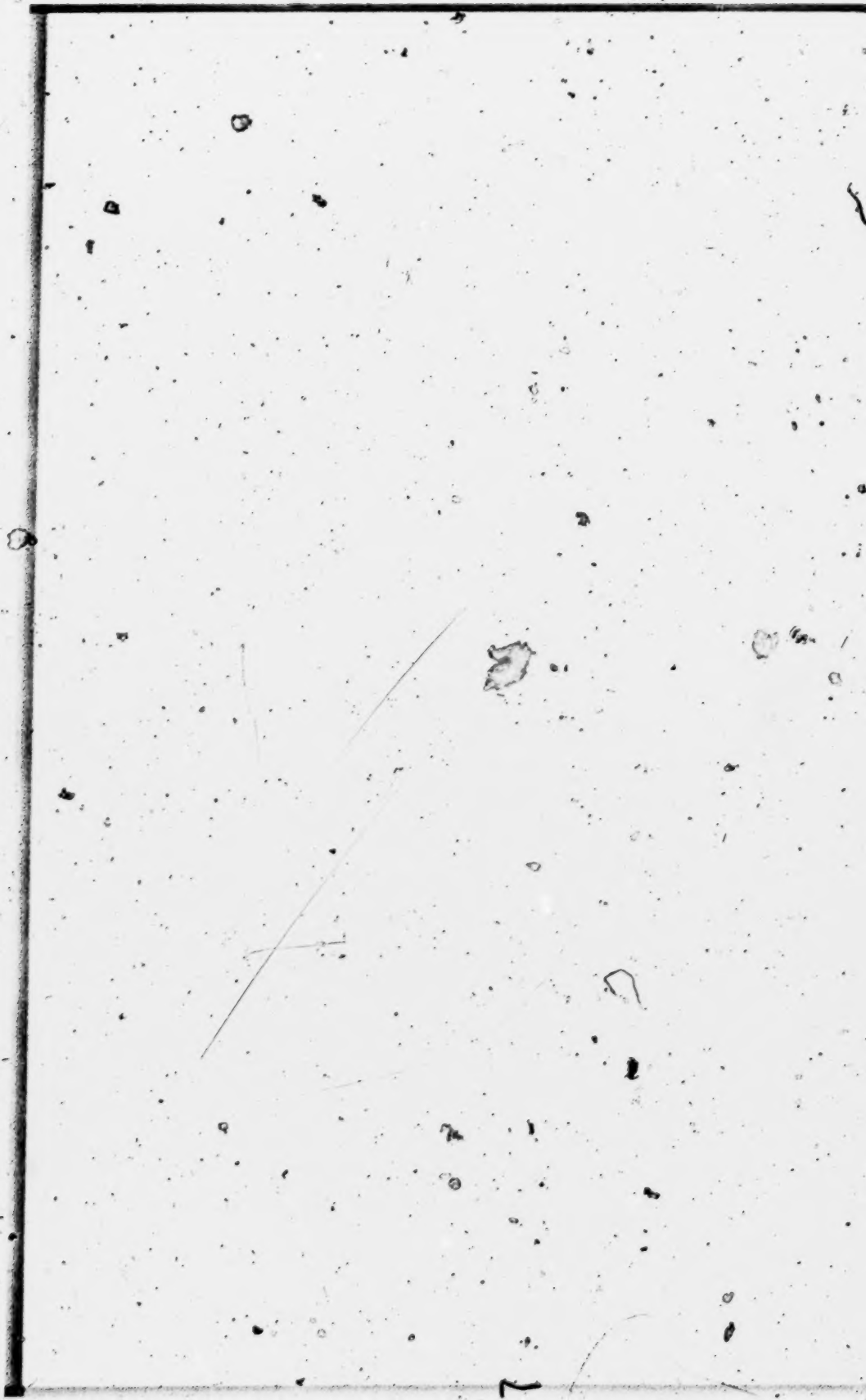
Now, the Supreme Court comes along and says, yes, it's true you're persons but you're not the kind of persons contemplated in the Statute.

They have engrafted something on there, we'll say. You understand I'm not criticizing that decision and I am not.

It is here before us and it construes that to mean any person who doesn't employ somebody else.

Now, that part, who does not employ somebody else, is void, which leads us right back to what the Statute actually says, "Any person may have a lien" and these two gentlemen are persons. They fit right into it and I feel that you would not be legislating, you would be enforcing the Constitution of the United States because you would be taking out simply those words, "Any person who doesn't employ somebody else", but, you see, these gentlemen are owners and under the act and if the Constitution of the United States and the Constitution of Oregon both say that lien limitation is out, they're still in there as persons.

THE COURT: Well, this is true and there's no question about the fact that these plaintiffs as individuals would be entitled to a lien for the work that they did in hauling the logs in question, and if they had filed liens for their own work and met the



statutory requirements, those liens would be honored by the Court and, if necessary, foreclosed according to the Statute, and I am aware that there are some apparent inequities perhaps in the legislative treatment of this, without meaning to be critical of the Legislature either, but at the same time, as I say, the ability of the Court doesn't extend to amending legislative enactments or extending them beyond the objectives intended by the Legislature.

I must take the decision of our Supreme Court which in this particular case has been expanded and concurred in by the United States Court of Appeals for the Ninth Circuit in 333 Fed. 2nd, the case that I referred to yesterday, and I must apply that rule to the situation.

Now, we are faced now with the situation where the plaintiffs them-

selves did perform some of the work that is involved here, but they did not segregate their work from that which was done by their employees so that non-lienabl items have been intermingled in the lien notice with lienable items and, of course, the decisions from our Supreme Court are numerous on that point, that a lien is void if non-lienable and lienable items are commingled in the lien notice, so I can only say to you, gentlemen, now that in view of the factual situation that is before the Court and the pleadings that are before the Court, we can try this thing for a week and we come out with the same result.

I can't see where in light of the decisions this Court would have any right to grant to these plaintiffs the relief they are asking for.

MR. HILL: I am not going to labor this any further except to say that I feel that I should

have a right to finish our case and that decision, if you decide to make one, may be deferred until that time.

THE COURT: I don't think so, Mr. Hill. We have purely a legal question, the pleadings submitted to the Court plus the stipulation.

In other words, by stipulation you are simply saying, well, these are the facts, these are the things that and this is what our pleadings mean, the whole problem is before the Court except some details which are completely irrelevant to the issues.

So far as granting any money judgment insofar as the lien is concerned, in light of the Southwick case and others, they at least inferentially cover this subject.

I think that once the defendants have said that insofar as the money judgment is concerned, they demand their right to a jury trial on it, this Court

has no right then in face of this to go ahead and even though denying the lien grant a money judgment for the sums that are found to be due on a contractual basis so the motion to dismiss the complaint will be allowed.

MR. HILL: If the Court please, may I say this? First of all, I have not been permitted to make a record on this point of constitutionality. There are certain facts, there's an allegation of fact in my affirmative defense on constitutionality.

I have not been able to prove that. Namely, that we paid our employees periodically before the money was due from the Balcoms and if they want to admit that allegation, then I will not need to.

THE COURT: Well, I would say, Mr. Hill, that I assume that in my ruling.

MR. HILL: Very well, your Honor. Now, I have something else.

THE COURT: I don't think it makes any difference.

MR. ERLANDSON: I would stipulate to that fact if it would help, counsel.

MR. HILL: All right, thank you, and you are stipulating to it?

MR. ERLANDSON: I have, I have.

MR. HILL: All right now, what we have proved here is that Feris Brothers did the hauling, the amount of money that they thereby earned we stipulated.

Mr. Caffall took the stand and said that he knew the hauling was going on from June until September 4th.

He also said that he got copies of the Forest Service scaling tickets so he knew they were hauling. Every single element of a common law cause of action for work and labor performed is admitted or undisputed in this case, and I feel that under the circumstances where that is true we are entitled to a judgment in the full amount of the claim against the Balcoms and against Caffall Brothers

Forest Products, the partnership.

I have cases which I can cite to the Court that where there is a lien claimed, the lien is denied, but a right to money is proved beyond dispute and it is not disputed here, we are entitled to a judgment for that full amount in this case.

THE COURT: No, I'm sorry. If you can get the Supreme Court to change its attitude on this, why, you've got a good lien but if you can't, why----

MR. HILL: Well, may I----

THE COURT: The motion to dismiss the complaint will be allowed.

EXHIBIT B

No. 8631--October 25, 1967

OPINION OF THE SUPREME COURT OF THE STATE OF OREGON

REPORTED AT 85 Or. Adv. 453, 432 P.2d 684

In Banc

FERIS et al, Appellants, v. BALCOM et al, Respondents.

Appeal from Circuit Court, Clackamas County.

PHILLIP K. HAMMOND, Judge.

Argued and submitted September 7, 1967.

Stuart W. Hill, Portland, argued the cause for appellants. With him on the briefs were Gilley, Busey & Hill, Portland.

J. Gary McClain, Milwaukie, argued the cause for respondents. With him on the brief were Erlandson, Morgan & McClain, Milwaukie.

Before PERRY, Chief Justice, and McALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and HOLMAN, Justices.

Affirmed.

HOLMAN, J.

In this suit to foreclose a logger's lien plaintiffs appeal from an order of the trial

court dismissing their complaint. The principal issue is whether an employer is entitled to a logger's lien for the labor of his employees under ORS 87.125.

The defendants Balcom contracted with the defendant Caffall Brothers Forest Products (Caffall Brothers) to log and haul timber owned by Caffall Brothers. The Balcom's subcontracted the hauling to plaintiffs. Plaintiffs employed others to help them haul the logs with plaintiffs' equipment. Part of the logs were hauled by plaintiffs individually and the balance was hauled by plaintiffs' employees. Caffall Brothers paid the Balcoms for the hauling but the Balcoms did not pay plaintiffs. Plaintiffs filed a lien on the logs for the amount due them from the Balcoms in which they commingled without segregation the hauling done by themselves and that done by their employees.

ORS 87.125 provides as follows:

"Every person performing labor upon or who shall assist in obtaining or securing sawlogs, spars, piles, cordwood or other timbers, has

> a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner or his agent.* * *"

The relevant facts in this case are substantially the same as those which existed in the case of McKinley et al v. Tice et al, 129 Or 190, 276 P 1110 (1929). In that case plaintiffs contracted with defendants to cut all of the timber on a particular tract of land and to deliver the logs to the mill of defendants. This court held that a logger's lien filed by plaintiff employers, which commingled without segregation work done by plaintiffs and their employees, was invalid. The right to perfect a logger's lien for labor was limited to the persons who actually performed the work. The commingling without segregation of lienable and non-lienable items was held to invalidate the entire lien. The court relied upon the following language from Loud v. Gold Ray Realty Co., 72 Or 155, 158, 142 P 785 (1914), which construed an analogous statute, the miner's lien law:

> "* * * The right to a lien of this kind is a creature of the statute, and the right to

perfect such a lien is limited to the persons who do the work or furnish the material or supplies: * * *."

The court distinguished the mechanic's lien law which provides that "contractors" are entitled to mechanic's liens for labor.

The Oregon Logger's Lien Law was taken from that of the State of Washington. North Pacific Lumber Co. v. Lang, 28 Or 246, 256, 42 P 799 (1895). The Supreme Court of Washington has construed the words "Every person performing labor upon, or who shall assist in obtaining * * *" to apply only to those who directly perform the labor and not to those who employed others to do it. Campbell v. Sterling Mfg. Co., 11 Wash 204, 39 P 451 (1895). In accord see Diamond National Corporation v. Lee, 33 F2d 517, 525-527, (9th Cir 1964) (construing similar Idaho statute).

It is our conclusion that McKinley is controlling and properly interprets the will of the legislature. Plaintiffs contend that Weissenfels v. Schaffer, 99 Or 228, 195 P 362 (1921), and Mathis v. Thunderbird Village, Inc., 236 Or 425,

389 P2d 343 (1964), require a different result than McKinley. We have examined the cases and do not believe them to be controlling.

Plaintiffs also argue that the McKinley rule violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and Art I, §20 of the Oregon Constitution. ORS 87.010 permits a construction contractor to file a mechanic's lien for his employees' labor, while, under McKinley, a logging contractor cannot. Plaintiffs contend this situation constitutes an arbitrary discrimination against the logger. Clearly, there are sufficient differences between the logging industry and the construction industry to provide a reasonable basis for providing different procedures for protection of workmen's pay. There is no merit in plaintiffs' contention.

Plaintiffs request a money judgment against Caffall Brothers if the lien fails. Caffall Brothers did not promise to pay plaintiffs and the circumstances are not such as to raise any im-

plied promise to pay. Therefore, plaintiffs are not entitled to such a judgment.

The judgment of the trial court is affirmed.

EXHIBIT C

FINAL DECREE OF THE SUPREME COURT OF OREGON ENTERED ON NOVEMBER 15, 1967; FROM WHICH THIS APPEAL IS TAKEN.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon and held at the courtroom in the city of Salem on the first Monday, the 2nd day of OCTOBER, 1967, WHEREUPON on this WEDNESDAY, the 25th day of OCTOBER, 1967, the same being the 15th judicial day of said term, when the following proceedings were had:

EDWARD L. FERIS and ALLEN L. FERIS, co-partners, dba Feris Bros. Trucking Co.,

Appellants

v.

LEO A. BALCOM and DOROTHY LORRAINE BALCOM, co-partners, dba D & L Logging Company or D & L Logging Co.; and C. C. CAFFALL, R. H. CAFFALL and REX CAFFALL, Jr., co-partners dba Caffall Brothers Forest Products or Caffall Brothers; and CAFFALL BROS. FOREST PRODUCTS, INC., a corporation,

Respondents

Appeal from CLACKAMAS County

This cause on September 7, 1967, having been duly argued and submitted upon and concerning all

questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the order of dismissal of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

Appellants having given an undertaking on appeal with Fidelity and Deposit Company as surety conditioned that appellants will pay all damages, costs and disbursements which may be awarded against them on the appeal,

IT THEREFORE IS ORDERED That respondents have and recover of and from appellants and their surety their costs and disbursements in this court taxed at $105.70.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

STATE OF OREGON,)
) ss.
County of Marion,)

I, F. M. SERCOMBE, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of decree has been by me compared with the original journal entry and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Salem, Oregon, November 15, 1967.

s/ F. M. Sercombe
Clerk of Supreme Court, State of Oregon

TO THE CIRCUIT COURT OF THE STATE OF OREGON,

For the County of Clackamas

You are hereby commanded that of the above judgment order of our Supreme Court you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Supreme Court, and to law

and justice shall appertain.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon November 15, 1967.

s/ F. M. Sercombe
Clerk of Supreme Court,
State of Oregon

EXHIBIT D

STATUTES RELATING TO LIENS OF LOGGERS AND WOODWORKERS

OREGON REVISED STATUTES, Volume 1
Pages 679, 680, 695 and 696

"87.125 Logger's lien. Every person performing labor upon or who shall assist in obtaining or securing sawlogs, spars, piles, cordwood or other timbers, has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner or his agent. The cook in a logging or other camp, and any and all others who may assist in or about a logging or other camp maintained for obtaining or securing sawlogs, spars, piles, cordwood or other timber, shall be regarded, for the purpose of this section, as a person who assists in obtaining or securing sawlogs, spars, piles, cordwood or other timber."

"87.130 Woodworker's lien. Every person performing labor upon, or who shall assist in manufacturing sawlogs or other timber into lumber, slabwood, plywood or other wood products, has a lien upon such lumber, slabwood, plywood or other wood products, while the same remains at the yard wherein manufactured, or while stored at any other place by or for the benefit of the manufacturer, whether their work or labor was done at the instance of the owner of the lumber or his agent."

"87.135 Limitation on extent of lien of loggers and woodworkers; adoption of statute sections. Persons claiming liens under ORS 87.125 and 87.130 are only entitled to liens for services, work or labor performed during the six months immediately preceding the filing of the notice of claim of lien. ORS 87.625 and 87.635 to 87.675

apply to the liens described in ORS 87.125 and 87.130, and proceedings connected therewith."

87.140 Filing of notice of lien. Every person, within 30 days after the close of the rendition of the services, or after the close of the work or labor mentioned in ORS 87.125 and 87.130, claiming a lien thereunder, shall file for record with the recording officer of the county in which the sawlogs, spars, piles and other timber was cut, or in which the lumber was manufactured, a claim containing a statement of his demand, and the amount thereof, after deducting, as nearly as possible, all just credits and offsets, with the name of the person by whom he was employed, with a statement of the terms and conditions of his contract, if any. If there is no express contract, the claim shall state what the service, work or labor is reasonably worth. The claim shall also contain a description of the property to be charged with the lien, sufficient for identification with reasonable certainty. The claim shall be verified by the oath of the claimant or some other person for him, to the effect that the affiant believes the same to be true. The claim shall be substantially in the following form:

_____, Claimant, v. _____, Defendant.

Notice is hereby given that _____ claims a lien upon (describing property), being about _____ more or less, which were (cut or manufactured) in _____ County, State of Oregon, are marked thus _____, and are now lying in _____, for labor performed upon and assistance rendered in (cutting or manufacturing logs or lumber). That the name of the owner, or reputed owner, is _____; that _____ employed said _____ to perform such labor and render such assistance upon the following terms and conditions (state contract, if any, or reasonable value); that the contract has been faithfully performed and fully complied with on the part of _____, who performed

labor upon and assisted in (cutting or manufacturing) for the period of ____; that said labor and assistance were so performed and rendered upon the property between the ___ day of ____, and the ___ day of ____; and the rendition of such services was closed on the ___ day of ___, and 30 days have not elapsed since that time; that the amount of claimant's demand for services is ____; that no part thereof has been paid (except ____), and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of ____, in which amount he claims a lien upon such property.

State of Oregon,)
County of ____) ss.

I, ____, being first duly sworn, on oath say that I am the ___ named in the foregoing claim; that I have heard the same read, know the contents thereof, and believe the same to be true.

Subscribed and sworn to before me this ____ day of ____.

87.645 Foreclosure. The liens described in ORS 87.125, 87.130, and 87.615 shall be enforced by a suit in the circuit court, and shall be governed by the laws regulating the proceedings for the foreclosure of liens generally.

87.670 Duration of lien. No lien described in ORS 87.125, 87.130 or 87.615 shall bind any timber or lumber for a longer period than six months after the claim has been filed, unless a suit is commenced in the circuit court within that time to enforce the lien.

87.625 Priority of liens; effect of payment by owner to contractor or subcontractor. The liens described in ORS 87.125, 87.130 and 87.615 are prior to all other liens, and no sale, transfer, mortgage or assignment of timber or lumber shall divert the lien thereon. No payment by the owner of such timber or

lumber to any original or subcontractor, made before 30 days from the completion of the work by the lien claimant, shall discharge any such lien unless such payment has been distributed among the persons assisting in obtaining, securing or manufacturing such timber and lumber, or if distributed in part only, then the payment shall discharge the liens only to the extent that the payment has been so distributed.

87.640 Discharge of lien on filing of bond. If at any time the owner of timber or lumber subject to the lien described in ORS 87.125, 87.130 or 87.615, or any person in his behalf, files with the recording officer of the county wherein the claim of lien is recorded a bond in a sum double the amount claimed in the lien, executed by a surety company licensed to do business in Oregon, or by two freeholders of the State of Oregon, having the qualifications of bail upon arrest, to be approved by the circuit judge of the district in which the lien is filed, or in the event of his absence from the county in which the lien is filed, by the county judge of that county, running to the lien claimant and conditioned for the payment of all damages, costs, charges and disbursements that may be recovered by the claimant against the owner or that may be found to be a lien upon the property described in the lien claim, the recording officer shall issue to the owner a certificate stating that the bond is substituted for the property and that the lien on the property is discharged, and a marginal entry of the discharge and bond shall be made in the lien docket containing the original record of claim of lien. If the lien claimant establishes the validity of his lien by a suit to enforce the same, he shall be entitled to judgment or decree against the sureties upon the bond. Nothing in this section shall deprive any person of any defense which he would have had if such bond had not been filed, and the filing of the bond shall in no way affect the time with-

in which the foreclosure suit shall be commenced.

87.650 Rights of claimant against timber or lumber involved. Any person who brings a suit to enforce the lien described in ORS 87.125, 87.130 or 87.615, or any person having such a lien who is made a party to any such suit, has the right to demand that the lien be enforced against the whole or any part of the property which is subject to the lien.

87.655 Joinder of lien claimants; costs. Any number of persons claiming liens under ORS 87.125, 87.130 or 87.615 may join in the same suit, and when separate suits are commenced the court may consolidate them. The court may also allow as part of the costs, the moneys paid for filing and recording the claim, and a reasonable attorney's fee for each person claiming a lien.

87.660 Judgment; sale after judgment. In the suit described in ORS 87.645, judgment must be rendered in favor of each person having a lien for the amount due him, and the court shall order any property subject to such lien to be sold by the sheriff in the same manner that personal property is sold on execution, and the court shall apportion the proceeds of the sale to the payment of each judgment, pro rata, according to the amount of the judgment.

87.665 Sale before judgment. The judge may, in vacation, upon motion and by affidavit showing that the property is liable to loss or destruction, order any property subject to a lien described in ORS 87.125, 87.130 or 87.615 to be sold on execution, before the judgment referred to in ORS 87.660 is rendered, and the proceeds of such sale shall be paid into court, to be applied as in that section directed.

87.675 Liability of person injuring, destroying or impeding identification of timber. Any person who injures, impairs, destroys or renders difficult or impossible of identification any property upon which there is a lien described in ORS 87.125, 87.130 or 87.615, without the express consent of the lienholder, shall be liable to the lienholder for the damages to the amount secured by his lien, which sum may be recovered by an action against such person without bringing the suit as provided for in ORS 87.645; provided, in such action the principal debtor shall be made a codefendant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

FERIS ET AL. *v.* BALCOM ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 1101. Decided March 25, 1968.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.